What Lurks in the Shadows of an M&A Deal?

Gisèle Rosselle
Partner
gisele.rosselle@strelia.com

Samantha Kabeya
Associate
samantha.kabeya@strelia.com

The number of things and legal issues that lurk in the shadows of an M&A deal are manifold. But there is one in particular that we would like to flag, and that is the competition law considerations. Parties should bear competition law issues in mind every step of the way in M&A deals. The practice of assimilating competition law issues in M&A deals to one single clause should be reversed. Competition law considerations basically enter into the picture when the precontractual negotiations' phase begins, and they remain a "lurking" issue until the actual closing of the transaction, and even post-closing.

This February edition of the Strelia M&A Series addresses some key elements pertaining to non-compete in M&A transactions: (i) timing and (ii) relevant transactional documentation.

Timing is everything

Without a doubt, the non-compete clause is often a "must have" in acquisition agreements and is considered a classic, standard clause aiming at protecting the legitimate interest of the buyer. This is certainly the case for share deals as Belgian civil law does not offer protection for the assets (i.e., business and property) underlying the shares. But even in asset deals in which the buyer enjoys some degree of legal protection through the implicit prohibition to compete, parties tend to make explicit and/or broaden this prohibition very often.

But it is important to bear in mind competition law considerations at a much earlier stage than the exchange of draft acquisition agreements. This is especially true in, for example, auction processes through which various unsuccessful bidders would have had access to confidential information. Here, not only the ultimately successful bidder but also the seller has every interest in having the information previously shared to them protected from unsuccessful bidders. Hence, this concern about non-competition should already be addressed in pre-contractual documentation such as NDAs and letters of intent. This is the very stage when sellers should also bear in mind the risk of an aborted deal and thus the interest to protect the target from a candidate buyer, regardless of any auction context. It may thus make sense to have a reciprocal non-compete clause.

Not only the non-compete clause itself but also other clauses in the acquisition agreements such as the interim covenants between signing and closing need to be carefully assessed from a competition law perspective. Indeed, following the EC *Altice* gun-jumping case, parties should exercise caution in their drafting, negotiating, and implementing pre-closing covenants that are not strictly necessary to protect the value of the business between signing and closing.

Lastly, parties should bear in mind that confidentiality and non-solicitation clauses can have the same effect as non-compete clauses, depending on the drafting.

Across multiple transactional documents

Besides addressing competition law matters in the NDAs and letters of intent in the pre-contractual phase, there are various transactional instruments that should include a non-compete clause. The acquisition agreements and JV agreements are the most obvious ones. In JV agreements, not only the controlling shareholder but also the minority shareholder who has veto rights on strategic matters should be bound to not compete.

Finally, when negotiating a deal, parties should also consider non-compete clauses in the ancillary agreements like license agreements, shareholders agreements and employment agreements. Parties should be careful not to simply copy these clauses and insert them across the board because the parties, the context, the starting point, and applicable rules may differ. And in an international context, parties should also be aware of the different national laws on contract, employment and competition.